Supreme Court, U.S.
FILED
AUG 15 1997
CLERK

(13)

No. 96-1400

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF CALIFORNIA
STATE LANDS COMMISSION

Petitioners,

v.

DEEP SEA RESEARCH, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI STATES OF FLORIDA, ALABAMA, ALASKA, GEORGIA, HAWAII, IDAHO, ILLINOIS, LOUISIANA, MARYLAND, MICHIGAN, NEW YORK, NEVADA, NORTH CAROLINA, SOUTH CAROLINA, VERMONT, THE COMMONWEALTHS OF MASSACHUSETTS AND VIRGINIA, AND THE TERRITORIES OF GUAM AND THE VIRGIN ISLANDS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICI

Amicus Florida and the other *amici* states write to urge the Court to reverse the decision of the United States Court of Appeals for the Ninth Circuit and to explain why the issues presented matter not just to California but to all of her sister States.

Three broad issues need to be addressed by the Court. First, and foremost: May a federal court inquire into the merits of a State claim to property on its submerged lands in order to determine the applicability of the Eleventh Amendment? This issue implicates vital issues of federalism and State sovereignty. The Eleventh Amendment protects the States' immunity from suit. Second, must "abandonment" only be express and explicit?; can there not be partial abandonment along with partial ownership?; may potential advances in salvage technology toll any claim of abandonment? Finally, are the States' extensive statutory and regulatory schemes for the preservation of historic shipwrecks "preempted" by the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101, et seq (hereinafter "ASA")?

The decision below has far reaching consequences. In enacting the ASA, Congress intended the States to have a principal role in the continued preservation and management of historic shipwrecks. 43 U.S.C. § 2101 and § 2104. To that end Congress sought the removal of the federal courts and admiralty system from these vessels. The Ninth Circuit's decision, however, has resulted not only in an abrogation of the States' Eleventh Amendment immunity, but has also made it infinitely more difficult for the States to manage historic, abandoned vessels on their property.

The States have a substantial interest in this controversy because they are the owners of the submerged sovereign bottom lands of oceans, gulfs, bays, lakes and rivers within each State's respective territorial jurisdiction. Within the States' lands are some 2,000 to 5,000[1]/ documented or potential historic shipwrecks[2]/ The States have enacted laws that created programs managing historic shipwrecks.

The Ninth Circuit's interpretation of the ASA must be reversed to allow the States' laws and management programs to continue in the public's interest.

SUMMARY OF THE ARGUMENT

The decision of the Ninth Circuit Court of Appeal's decision deviates from the past decisions of this Court on the showing required of the States when asserting the Eleventh Amendment immunity. In the past, this Court, in such cases as *In re State of New York*, 256 U.S. 490 (1921); *The Queen City*, 256 U.S. 503 (1921), have sustained a State's Eleventh Amendment immunity based merely upon the verified assertion of the State official that the.State had an interest in

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1/ This number may be even larger. For example, within the past year, Florida's Division of Historical Resources has confirmed the location and general identification of a Spanish shipwreck discovered in 1992 in Pensacola This wreck is one of seven vessels of the expedition of Tristan de Luna y Arellano known to have sunk during a hurricane of 1559. These vessels may be the oldest known shipwrecks in American history. They are but part of more than 100 historic shipwrecks lying in Pensacola Bay alone.

2/ *See, e.g.*, Department of the Interior's Guidelines, Part IV, 55 Fed. Reg. 50116.

the property under litigation in the federal court. Other circuit, namely the First and the Seventh, have accepted the respective States' assertion of title to trigger the Eleventh Amendment immunity. Neither have required the States to proceed to some detailed proof of their assertion. The Ninth Circuit's decision below is contrary to both this Court and the First and Seventh Circuits treatment of a State's Eleventh Amendment assertion.

The decision below also fails to follow the Court's standard for addressing an Eleventh Amendment assertion set forth in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Instead of examining in any manner either of the two grounds that will have abrogated a State's immunity, the Ninth Circuit conducts the very inquiry this Court rejected in *Larson*. There were no assertions that California or its officials were asserting an interest "unconstitutionally" or that California was acting outside of any statutory authority. The assertion was merely that title did not lie in California. This is the very inquiry the *Larson* court, and the dissenting justices in *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982), stated could not be done by a federal court.

The Ninth Circuit erred when it decided that abandonment could only be shown by express acts of the property owner. This is inconsistent and in conflict with the general maritime law and specific decisions of the First, Fifth and Eleventh Circuits. As the admiralty law has long recognized, and as those courts confirmed, abandonment can be found by either the length of time since the sinking of the vessel and the inactivity of the owner of the vessel.

The Ninth Circuit compounded its abandonment error when it made two additional rulings. First, that abandonment was "stayed' pending the invention of technology, reasoning that the owner, at the time of the loss, did not have the "means" to recover the vessel. And second, that a vessel, its cargo and the personal effects of the passengers and crew, must be abandoned or recovered in the "whole." As to this part of the court's ruling, there can be no such thing as "partial abandonment" or a distinction between abandoned property and that property which still has an owner.

Finally, the Ninth Circuit erred when it ruled that California's law claiming and protecting abandoned vessels was preempted by the Abandoned Shipwreck Act, 43 U.S.C. § 2101, *et seq.* This is contrary to the history of the entire field of historic preservation as long practiced by the States, the expressly stated congressional intent of the ASA and the long standing common law of finds.

For the many reasons argued by the Amici, the decision of the Ninth Circuit should be reversed. The States need and deserve a uniform standard to assert the Eleventh Amendment without being subjected to litigation in federal court. Further, the States needs one standard of what is "abandoned" and what may consist as proof, in the States' courts, of abandonment. Lastly, the States need to know that their long standing historic preservation laws have not been preempted by the ASA.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE ELEVENTH AMENDMENT

A. THE ELEVENTH AMENDMENT EMBODIES THE CONCEPT OF SOVEREIGN IMMUNITY IN ITS ENTIRETY

The Eleventh Amendment embodies the broad and fundamental principles of sovereign immunity. *Welch v. Texas Dept. of Highways*, 483 U.S. 468, 472, 486 (1987); *Green v. Mansour*, 474 U.S. 64, 68 (1985). This limitation on the judicial power of the United States is a "compelling force,". *Ford Motor Co. v. Indiana,* 323 U.S. 459, 467 (1945), absolute and extending to all suits regardless of the relief sought. Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 113 S. Ct. 684, 688 (1993). By its very terms the Amendment applies to "any suit in law or equity," a premise acknowledged in *Cory v. White,* 457 U.S. 85, 90 (1982):

> *Edelman* did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the State treasury is sought. [footnote omitted] It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the state itself simply because no money judgment is sought.

This bar is necessary "to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico*, 113 S. Ct. at 689. *See also, Fitts v. McGhee*, 172 U.S. 516, 527-28 (1899). The

Court has frequently recognized this broad intent:

> The fact that the motive for the adoption of the 11th Amendment was to quiet grave apprehensions that were extensively entertained with respect to the prosecution of state debts in the federal courts cannot be regarded...as restricting the scope of the amendment to suits to obtain money judgements. The terms of the amendment...were not so limited.

Missouri v. Fiske, 290 U.S. 18, 27 (1933).

The Eleventh Amendment exists to accord the States the respect owed them as members of the federation. In *Hess v. Port Authority Trans-Hudson Corp.*, __U.S. __, 115 S. Ct. 394, 400 (1994). The Amendment "emphasizes the integrity retained by each State." *Id. Accord, Fitts v. McGhee*, 172 U.S. at 528 (Eleventh Amendment's purpose was to prevent the indignity of subjecting the States to coercive process of the federal courts.)

The Eleventh Amendment is a "fundamental protection" and is

> rooted in a recognition that the States, although a Union, maintain certain attributes of sovereignty, including sovereign immunity...It thus accords the States the respect owed them as members of the federation.

Puerto Rico, 113 S. Ct. at 688-89. No matter what relief is requested, suits against the State violate the fundamental value of sovereign immunity as embodied in the Eleventh Amendment and are barred, absent the consent of the sovereign State.

B. THE NINTH CIRCUIT WENT FAR BEYOND THIS COURT'S BOUNDARIES OF *LARSON*

Fifteen years ago, the dissenting justices of this Court in *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 717 (1982), stated the following:

> Given that all property of the State must be held by its officers, and assuming a jurisdictional basis, there is no item within state possession whose ownership cannot be made the subject of federal litigation by the expedient of arrest or attachment. The State must then defend on the merits: it must persuade a federal court that its officers were justified in holding the controverted property. We see today that this inquiry will be tantamount to deciding the question of title itself.

With but a slight twist, in that California is not in physical possession of any artifacts from the *Brother Jonathan*, this case very well could be *Treasure Salvors* all over again. This Court is faced with the question of whether or not a federal court may, under the guise of the classic "jurisdiction to determine jurisdiction," determine what in effect is a state's title to historic artifacts.

The issue arose in *State of Florida v. Treasure Salvors, Inc.*, 621 F.2d 1340 (5th Cir. 1980). The majority, in responding to Florida's Eleventh Amendment immunity claim stated:

> Once an appropriate challenge is made, a district judge is no longer compelled to conclude that the state owns the res in dispute. Instead, the Court must make a jurisdictional determination very similar to that made in the classic "jurisdiction to determine jurisdiction"

line of cases.

Id, at 1345. The majority believed it could freely proceed because "ownership of the salvaged items is determinative of both the eleventh amendment and the merits." *Id.*, at 1346.

The dissenting judge did not agree. It was Judge Rubin's opinion that

> [b]ecause the State of Florida contended that it had title to the property within the jurisdiction of the court, the eleventh amendment deprived the district court of jurisdiction to adjudicate the State's title or lack of it.

Id., at 1350 (J. Rubin, dissenting). Stating it rather succinctly, "[o]nce the state appears and asserts title to the property in dispute the court's jurisdiction ends." *Id.*, at 1351. Thus, under the Eleventh Amendment,

> The doctrine that a court has jurisdiction to determine its own jurisdiction does not permit it to decide the merits of a suit against the state.

Id. In his stinging retort, cited by the dissenting justices of this Court in footnote 13 of their opinion in *Treasure Salvors*, 458 U.S., at 717, Judge Rubin stated:

> In essence, the suggestion by my brethren that the court can determine whether it has jurisdiction of a suit over state-claimed property by looking to the merits is equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses.

Treasure Salvors, 621 F.2d at 1351.

When the *Treasure Salvors* case came before this Court, the dissenting justices agreed with Judge Rubin. The dissenting opinion correctly notes that the plurality's statement that Florida's lacks colorability in its claim "for all practical purposes adjudicates the State's title, . . " *Treasure Salvors*, 458 U.S. at 703.

The justices then went on to cite and explain in detail the rationale behind *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). *Larson* stands for the proposition, the dissenting justices opined, that there exist only two grounds under which an official of a sovereign could be sued without implicating the sovereign itself. Those two being where the actions of the official exceed the official's statutory authority and where the actions of the official are asserted to be unconstitutional. *Treasure Salvors*, 458 U.S., at 714-715, citing *Larson*, 337 U.S., at 689.

But the *Larson* court rejected, as the dissenting justices explained, a third category permitting jurisdiction, where the official is alleged to be merely holding the title to property unlawfully. *Larson*, 337 U.S., at 693. Treasure Salvors asserted that Florida was holding the property illegally. There were no allegations that the State acted unconstitutionality or outside of statutory authority at the time Florida executed contracts with Treasure Salvors and came into possession of the property. Finding that an *in rem* action is in reality an action to adjudicate title to property, *Treasure Salvors*, 458 U.S., at 715, n.13, the dissenting justices argued that the case before them was "a *Larson* case." *Treasure Salvors*, 458 U.S., at 716. And because it was a *Larson* case, the dissenting justices believed the court was barred by the Eleventh Amendment from adjudicating

the State's title under the guise of exercising its "jurisdiction to determine jurisdiction."

The legal reasoning of the Ninth Circuit in this case is no different than that of the Fifth Circuit in *Treasure Salvors*. The court below used the same "jurisdiction to determine jurisdiction" justification to adjudicate California's interest in the *Brother Jonathan*. That is because instead of merely seeing if California had a "colorable" claim, the Ninth Circuit went on to rigorously test the "claim" of the State to see if the court had jurisdiction under the ASA. Pet.App. A-19. Granted, the final determination of title to a state depends upon whether the wreck is abandoned and eligible for the National Registry or embedded, but a "colorable" claim can be made merely by the State's assertion that the wreck lies on state-owned lands.[3]/ California did just that. That should have ended the inquiry and the case should have been dismissed and any detailed issue tried in a California court.

Therefore, maybe it is time this Court revisit *Treasure Salvors* and either further narrow the plurality opinion, or overrule it, and elevate the dissenting justices' reasoning that in a situation like this, the *Larson* reasoning applies.

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[3]/ If the artifacts of the *Atocha* had been found within Florida's boundaries, the dissenting justices noted that it

> would be beyond cavil that Florida owned one-fourth of the artifacts pursuant to its ownership of the submerged lands on which the *Atocha* rested as well as the contracts.

Treasure Salvors, 458 U.S., at 711.

C. "COLORABLE" MEANS THE APPEARANCE OF TRUTH, GOOD FAITH ASSERTION IS SUFFICIENT

The Eleventh Amendment bars federal courts from hearing suits against a state. *Treasure Salvors*. However, by requiring California to fully litigate the issue of abandonment in the federal court, the Ninth Circuit crossed over the line of state immunity from the Eleventh Amendment.

Ignoring the obvious basis for a "colorable" claim, the Ninth Circuit actually tried California's interest in the *Brother Jonathan*. The practical effect of the Ninth Circuit's ruling, if allowed to become the law of the land, would be that, instead of divesting the federal admiralty courts of jurisdiction historic shipwreck matters, as intended by Congress, the states will have to go through a federal court proceeding to determine if the state has title to a wreck. Thus, the issue of what is meant by the term "colorable" claim becomes of critical importance.

This Court has already ruled that the Eleventh Amendment applies to suits in admiralty and maritime actions where the action is really against a state or state agency. *See*, *In re State of New York*, 256 U.S. 490 (1921); *The Queen City*, 256 U.S. 503 (1921).[4]/ The Court, in *Treasure Salvors*, faced with the issue:

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[4]/ In those cases, this Court ruled the Eleventh Amendment barred federal court jurisdiction even though the State of New York merely filed "verified suggestions" of the lack of jurisdiction and nothing more.

> [w]hether the Eleventh Amendment to the United States Constitution bars an in rem admiralty action seeking to recover property owned by a state[,]

answered the question by stating a federal court

> did not have power, . . . , to adjudicate the State's interest in the property without the State's consent.

Id., at 682. *See also, State of Florida, Department of State v. Treasure Salvors, Inc.*, 689 F.2d 1254, 1256 (5th Cir. 1982). The Court's Eleventh Amendment decision in *Treasure Salvors* was predicated on the fact that the "[Florida] officials [did] not have a colorable claim to possession of the artifacts, . . ." *Id.* Because the State officials did not have a "colorable claim," Florida could not invoke the Eleventh Amendment. *Id.* This statement leads to the logical conclusion that if Florida had a "colorable claim" to the artifacts, the Florida officials could have invoked the Eleventh Amendment. However, the plurality decision did not define what type of claim was "colorable."

However, we are not operating in a vacuum in this case. The term "colorable" has been defined many times and has a clear meaning. In simple every day usage, *Webster's Third New International Dictionary*, (1981) p. 449, defines "colorable" as "seemingly valid and genuine; having an appearance of truth, right or justice; plausible." *Black's Law Dictionary*, 6th Ed. (1990), p.265 likewise defines "color" and "colorable" "Color" is "an appearance, semblance, or *simulacrum*, as distinguished from that which is real." "Colorable" is "that which is in appearance only, . . . what it purports to be, . ." *See also Windle v. Flinn*, 196 Or. 654, 251 P.2d 136, 146 (1952); *Ray v. Beneficial Finance Co. Of*

North Jersey, 92 N.J.Super 519, 224 A.2d 143, 156 (1966).

Various courts have given the term similar meaning. This Court has addressed the term when it would determine federal jurisdiction. In *Bell v. Hood*, 327 U.S. 678, 682-83 (1946), the Court inferred what was not "colorable" "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *See also Spencer v. Casavilla*, 903 F.2d 171, 173 (2nd Cir 1990); *Chesna v. U.S. Department of Defense*, 822 F. Supp. 90, 97 (D. Conn. 1993).

To avoid the exhaustion of administrative remedies requirement, a claim of irreparable injury must be "colorable," defined as "is not wholly insubstantial, immaterial, or frivolous." *Johnson v. Shalala*, 2 F.3d 918, 922 (9th Cir. 1993); *Sorenson v. Concannon*, 893 F. Supp. 1469, 1477 (D. Or. 1994). Additionally, the question of what is "colorable" has arisen often in the attorney fees context. *See Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir.1980) ["where it has some legal and factual support, considered in light of reasonable beliefs of individual making claim"]; *Berlington Coat Factory Warehouse v. Belk Brothers Co.*, 621 F. Supp. 224, 238 (S.D. N.Y. 1985); *Dunn v. Florida Bar*, 726 F. Supp. 1261, 1269 (M.D. Fla. 1987) [one this arguably supported by case or statute law]

The clear import of theses cases is that the claim does not have to be crystal clear, without question or definite. The claim only needs to have the appearance of correctness in the assertion that it is presented for.

California's claim possesses at the least the appearance of right. California had a "colorable" claim to the *Brother Jonathan* to invoke the Eleventh Amendment immunity. First, the ASA itself granted title to California if the vessel was abandoned and on state-owned lands. Due to the time since the *Brother Jonathan* was lost, there was ample evidence the owners have abandoned the vessel. And DSR itself proved the vessel was not only on California's submerged lands, but was embedded as well. Second, California law claimed title to this vessel. Cal.Pub.Res.Code § 6313.

California has had a justifiable claim under the common law of finds. The common law of finds states title to lost and abandoned property lies in the first except where the lost item is embedded in the soil. Then it is the owner of the land in which the lost item is embedded that is the owner of the item. *Klein v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985). A glaring problem with the Court of Appeal's decision lies with the law of finds. The court states the ASA does not give California title to the vessel. Yet the court also does not conduct any further inquiry as to why DSR has a claim under admiralty law. Since the facts are clear that DSR possesses only a very small claim in relation to the entire cargo and hull of the *Brother Jonathan*, then under pure admiralty law, the vessel is abandoned.

In order to provide this "seemingly valid and genuine; having an appearance of truth, right or justice; plausible" claim, all California had to do was to provide the district court with a good faith assertion, similar to that which was done in *In re State of New York* and *The Queen City*, that the

Brother Jonathan had the appearance of being abandoned and appearing to lie on state-owned lands. California did this but was rebuffed by the courts below.

This Court needs to clarify what it has in the passed referred to as "colorable" by explicitly stating that the "appearance" of a rightful claim, the plausibility of a claim, in light of the Court's Rules that require verified pleadings and allows punishment of those who abuse the Rules, is all that is necessary to establish "colorability." The rule of law of the Seventh Circuit, *Zych v. The Wrecked Vessel Believed to Be the "Lady Elgin"*, 960 F.2d 665, 670 (7th Cir.), *cert.denied*, 113 S.Ct. 491 (1992) ["The strength of the state's legal position is irrelevant, . . . We hold that it is the existence, and not the strength of the claim that activates the eleventh amendment] and the First Circuit's *Fitzgerald v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 866 F.2d 16, 18 (1st Cir. 1989) ["irrespective of the actual merit of the Commonwealth's claim to the salvaged wreck and treasures."] should become the rule of law on "colorability" and the Eleventh Amendment; as long as a state's claim is plausible, appears to have any merit on the face of the claim, then the Eleventh Amendment will bar further federal court activity.

II. "ABANDONMENT" DOES NOT REQUIRE EXPLICIT EXPRESSION; PARTIAL OWNERSHIP DOES NOT NEGATE PARTIAL ABANDONMENT

A. "ABANDONMENT" MAY BE IMPLIED

Prior to the Ninth Circuit's ruling, abandonment could be inferred from by length of time or non-action.[5]/ This has been recognized as a normal theory of admiralty. *See Bemis v. RMS Lusitania*, 884 F.Supp. 1042, 1049 (E.D. Va. 1995); 3A Norris, *Benedict on Admiralty* Sec. 134 (7th ed. 1993). The Ninth Circuit now imposes on the States a standard that will be nearly impossible to meet because is it like proving the proverbial *non sequitur*. For vessels lost over 100 years, proving "express" abandonment will probably not occur on any frequent basis. First of all, if such an express abandonment occurred, evidence of such an act would most likely be lost. The States simply do not have access to whom the past owners may have been or who their successors are. Nor are the States likely to have access to records to the vessel to determine if the vessel was insured and what happened to the insurance coverage.

Time, in and of itself, can be grounds to find abandonment. Nearly 20 years ago the Fifth Circuit Court of Appeals, when discussing the difference between the law of finds and the law of salvage, stated:G18

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[5]/ *See, e.g. Moyer v. Wrecked and Abandoned Vessel*, 826 F. Supp. 1099, 1105 (D. N.J. 1993); *Chance v. Certain Artifacts Found and Salvaged*, 606 F. Supp. 801, 804 (S.D. Ga. 1984), *aff'd without opinion*, 775 F.2d 302 (11th Cir. 1985); *Wiggins v. 1100 Tons, More or Less of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960).

> Courts, however, have rejected the theory that title to such property can never be lost and have applied the law of finds.
>
> Disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths.

Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 337(5th Cir. 1978).[6]/

However, the Ninth Circuit now wants more from the States than has been required in the past. The Brother Jonathan was lost for 128 years before being found. Its location was not know for that period. The 128 year time period alone should have meant that the Brother Jonathan was abandoned.

The Ninth Circuit also held that California had failed to prove "the owners of the vessel have failed to undertake salvage efforts." The Court did not explain how a State is go about proving whether or not salvage efforts were made by the past owners. The States do not have the records of the vessel, do not usually know who the owners were and do not

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[6]/ This position has been adopted by the Eleventh Circuit in *Klein v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985) ["it would be absurd to apply maritime salvage law to a vessel whose very location has been lost for centuries], and the First Circuit in *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987)["so long lost that time can be presumed to have eroded any realistic claims of original title"].

usually have knowledge of any insurance companies. Without these records, the State cannot prove anything.

B. PARTIAL ABANDONMENT IS POSSIBLE

Lastly, the Ninth Circuit's decision to allow the salvor possession of the entire vessel when that salvor may have a legitimate claim to only a portion of the historic shipwreck flies in the face of logic, salvage law and proper management of the historic vessel. The hull, cargo and personal belongings on a vessel are separate and distinct so that they may be salvaged independent of one another. *See Bemis v. RMS Lusitania*, 884 F. Supp. 1042 (E.D. Va. 1995). A claim for the hull does not bring with it a claim for the cargo and belongings. Id. at 1047.

Bemis and the district court's opinion in this case, *Deep Sea Research v. Brother Jonathan*, 883 F. Supp. 1343 (N.D. Cal. 1995), are cases in contrast. Where the court in *Bemis* took a great deal of time to examine the evidence of Mr. Bemis' claim to the RMS Lusitania to determine "if" Mr. Bemis could claim a chain of title from the ship through the owners and insurance companies to Mr. Bemis, the district court's opinion in this case is totally devoid of such an effort. While it is conceded that DSR "asserts" it holds title from the original insurance companies, there is nothing in the opinion showing that the district court examined the chain of title from the *Brother Jonathan* through the insurance companies to DSR. All the district court did was to chide California for not proving abandonment. *Brother Jonathan*, 883 F. Supp., at 1351-54. It was as if District Court concluded since California could not show the vessel was abandoned, DSR automatically had title. These are two

independent and exclusive determinations. The district court and the Ninth Circuit erred.

From a management perspective, the Ninth Circuit's decision also makes no sense. The *Brother Jonathan* is undoubtledy an abandoned historic vessel covered by the ASA. Congress, through the ASA, intends that wrecks like the *Brother Jonathan* be managed in a sane and respectful manner so that many groups can benefit from the presence of the shipwreck.

The approproiate action would call for two separate court actions. In the federal court, DSR could perfect its title to the *Brother Jonathan* against all others except the State of California.[7]/ DSR would then proceed in a California state court and prove its claim to the items DSR claims are not abandoned.[8]/

If DSR does in fact possess title to some portion of the cargo, the more reasonable course would be for California and DSR to work out a coordinated plan of recovery that respects not only the salvor's rights, but also those of the environment, historic and recreational communities.

However, by ruling that DSR can claim the entire wreck

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[7]/ *See, e.g., MDM Salvage v. Unidentified Wrecked and Abandoned Sailing Vessel*, 631 F. Supp. 300, 311 and 313 (S.D. Fla. 1986)

[8]/ DSR would have to prove three factors: 1) the cargo DSR claims was insured; 2) the insurance company paid for the loss of the cargo; 3) the insurance company that paid the claim on the cargo or vessel itself had not abandoned its claim to the property; and 4) DSR received an assignment from the insurance company that paid for the loss.

allows the tail to wag the dog. Here we have a vessel that was not insured and no claim of ownership has been maintained since 1865 to the hull. The same holds true for the majority of the cargo and personal belongings remaining on the vessel. No subrogation to the hull or other items has been obtained by DSR. For the hull and the other items not covered by subrogation, these items are clearly abandoned and covered by the ASA.

C. TECHNOLOGICAL REQUIREMENTS

The Ninth Circuit requirement that the technology exist to locate the vessel before finding abandonment, *Deep Sea Research, Inc. v. Brother Jonathan*, 102 F.3d 379, 388 (9th Cir. 1996), is especially troublesome for the States. The very heart of abandonment is the intent of the owner to give up, at or near the time of loss. This ruling allows the owner to never abandon the vessel because some new technology may come in the future to allow recovery of the vessel. Nor did the Ninth Circuit describe or define what technology has to be in existence before the "time" begins to run on the owner.[9]/

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[9]/ During the week of July 28, 1997, the national news was reporting the historic find by Mr. Robert Ballard, the noted underwater explorer and finder of such vessel as the *Titanic* and *Bismarck*, of a number of Roman vessels found some 2000 feet deep in the Mediterranean Sea in the sea lanes between North Africa and Rome. Some of the vessel go back before the birth of Christ. The find was in an area not previously explored by anyone and in an area thought by everyone not to contain any vessels as it was considered too dangerous to travel those lands and, thus, no ship at that time would have sailed in that direction. The previous theory was wrong.

This reliance on technology as the touchstone for "abandonment" is even the more interesting because upland, or land, abandonment, has never been saddled with this rule of law. Items lost on land have never been restricted to those that technology cannot find.

III. THE ASA DID NOT PREEMPT STATE PRESERVATION LAWS

The Ninth Circuit ruled in its opinion that California's statute[10]/ claiming "title to all abandoned shipwrecks," Cal. Pub. Res. Code § 6313, was preempted by the ASA to the extent the California law could claim title to abandoned vessels that do not meet the requirements of the of the ASA. *Brother Jonathan*, 102 F.3d. at 384. This ruling is both incorrect and inconsistent with both the ASA and admiralty law.

Under the Ninth Circuit's reasoning, because of the depth of the vessels and the need for modern technology to both find and recover historic artifacts from those depths, these Roman vessels, lost over 2000 years ago, are not "abandoned." This turns common sense and logic on its head.

[10]/ Florida's equivalent statute is Sec. 267.061(b), Fla. Stat. (1995), which provides:

> It is further declared to be the public policy of the state that all treasure trove, artifacts, and such objects having intrinsic or historical and archaeological value which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state with the title thereto vested in the Division of Historical Resources of the Department of State for the purposes of administration and protection.

This statute was enacted in 1967 and codifies Florida governmental practice back to at least the 1930's.

A. THE ASA DID NOT INTEND TO PREEMPT STATE LAWS; IT INTENDED TO SUPPLEMENT

Maritime properties, sites, objects and artifacts have long been part of traditional historic preservation.[11/] The States, like Congress[12/], protect and study their archeological treasures.[13/] The States' statutes and management programs came into existence long before there was any thought of an ASA.

Rather then displacing the States' preservation laws, the

[11/] Because of this tradition, there are a number of federal, state, local, and private maritime parks, museums and exhibits across the nation dedicated to maritime history. *See* Addendum A for a representational listing of such parks, museums and exhibits.

[12/] While Congress had not expressly addressed "shipwrecks" in any of the Federal historic preservation laws prior to the ASA, none of these acts restricted their application to upland sites; the clear implication being that cultural resources will be protected no matter where they are found on federal lands. *See, Lathrop v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 817 F. Supp 953, 962-64, 966 (M.D. Fla. 1993); *Klein v. Unidentified, Wrecked and Abandoned Vessel*, 568 F. Supp. 1562, 1567-68 (S.D. Fla. 1983) ["without question Congress had power to protect the wreck" referring to the Antiquities Act].

Further support for such congressional power can be found in *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). There this Court interpreted the Property Clause of the Constitution, art. IV, sec. 3, cl. 2., as giving Congress unlimited power over the public lands. (citing *United States v. San Francisco*, 310 U.S. 16, 29 (1939)).

[13/] State historic protection laws are set forth in *Petitioners' Petitioner's Petition For Certiorari*, p.15, n.5. and underwater preservation laws at *Petitioners' Brief*, p.17, n.6.

intent of Congress was to supplement and support the States' efforts by eliminating an impediment to the States' programs; federal admiralty court intrusion. Prior to the ASA, at least 27 states had laws protecting historic resources, including shipwrecks. Prior to the 1980's, these programs were not interrupted. However, beginning with *Cobb Coin, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, (S.D. Fla. 1982), States, and especially Florida, were routinely being hauled into federal court by commercial treasure salvors attempting to force the divestiture of the States' title to these resources. These salvors attempted to use the admiralty's *in rem* proceeding to evade the Eleventh Amendment and acquire sole title to these vessels lying on state lands.

Because of this, the States turned to Congress for assistance. 134 Cong. Rec. H1178, 1180 (Mar. 28, 1988)[Statement of Walter B. Jones - States had written to him seeking Federal legislation to confirm States' ownership claims]. The States did not go to Congress to have their laws and programs preeempted. And Congress did not show the slightest interest in preempting the States' extensive management programs. The ASA was enacted to "confirm" the States' preexisting claims to shipwrecks. 43 U.S.C. §§ 2101, 2103. *See also* S.Rep. No. 241, 100th Cong., 1st Sess. 3-4 (1987); H. R. Rep. No. 514, 100th Cong., 2nd Sess., pt.2, at 8 (March 28, 1988).

The Seventh Circuit Court of Appeals noted in *Zych v. Unidentified, Wrecked and Abandoned Vessel Believed to be the SEABIRD,*, 941 F.2d 525, 528-30 (7th Cir. 1991), *cert. denied,* 115 S.Ct. 420 (1991), that the intent of Congress was to enact a law that protected abandoned shipwrecks and

provided for the responsibility to manage these shipwrecks.[14]/ Because of the specific purpose, the legislative scope of the ASA is quite narrow. Id., at 529 and 530. The number of vessels thus covered by the ASA is quite small. Id., at 529 [the number of vessels is estimated to be between 2,500-5,000].

The intent of Congress meshes with the preservation and management of abandoned shipwrecks. Management consists of various decisions necessary to determine the best use of each particular wreck. This process involves many experts such as archaeologists, environmentalists and land use managers. The State's aim is to decide first if a site will be used at this time. Then, if a site is to be used, among the competing users of the site, the question as to who will best be able to utilize a particular site and how a site will be prepared and actually used.

Much of the process revolves around the physical location of the wreck and the environment it is in, the nature of the wreck, and what use of the wreck would be in the best interest of the public. The primary competing interests affected by such management are archaeologists, sport divers, commercial and recreational fishermen, tourist development proponents and salvors. If the wreck is historical, the primary focus would be on the historical

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[14]/ Citing often the reports of the House and Senate, the Seventh Circuit repeatedly found that the Congressional intent in the passage of the ASA was to protect and manage "historic shipwrecks." Id., 941 F.2d at 528 and 529 ["ensure protection of shipwrecks of historic significance"] ["admiralty not suited for the preservation of historic shipwrecks"].

preservation of the wreck site. However, if the wreck is historic, yet of a nature that archeological recovery is not necessary, then it must be decided whether the wreck is better left undisturbed for sport divers and tourism or whether to permit commercial salvage of the wreck.

Being that Congress intended to fulfill the traditional role of the States in protection and management of wrecks for a variety of public uses, the decision of the Ninth Circuit is a complete misreading of the situation. There is no preemption.

The Ninth Circuit is incorrect for another reason. The court ruled that California's statute went beyond the ASA, and therefore preempted, because California's statute claimed all abandoned wrecks. However, the very language of the ASA states that Congress intended the ASA to cover "abandoned shipwrecks." 43 U.S.C. § 2101. The United States asserts title to "abandoned shipwrecks" embedded[15]/ in the soils of the States. 43 U.S.C. § 2105(a). The United States then transfers title to those wrecks to the States on

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[15]/ The ASA defines "embedded" to mean " firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof" 43 U.S.C. § 2102(a). However, this does not mean the entire hull and cargo must be below the surface of the ocean floor. *See Zych v. The Unidentified, Wrecked and Abandoned Sailing Vessel Believed to be the SEABIRD*, 941 F.2d 525, 529 (7th Cir. 1991), *cert. denied* 115 S.Ct. 420 (1991) [partially buried]; *Jupiter Wreck, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 691 F.Supp. 1377, 1386 (S.D. Fla. 1988) [only some of the artifacts may be buried or partially buried].

whose land it is embedded. 43 U.S.C. § 2105(c). Notice, there is no language of limitation or qualification. 43 U.S.C. § 2101 states "any abandoned shipwreck." Essentially, unless an embedded abandoned vessel is still owned, the vessel belongs to the State.

B. IRRESPECTIVE OF THE ASA, THE ADMIRALTY LAW OF FINDS PERMITS THE STATES TO CLAIM TITLE TO ABANDONED VESSELS.

The error on the Ninth Circuit's ruling that California cannot claim title to any abandonded wreck not covered by the ASA runs afoul of admiralty's common law of finds in general and the Circuit's own *Marx* decision in particular. The ASA did not alter the law of finds as to other abandoned wrecks and Congress did not decree States could not claim ownership to vessels ouside of the ASA.

For this argument, let us assume that there exists an "abandoned" vessel lying on and embedded in the submerged sovereign lands of a State.[16]/ Let us assume that the vessel sank less than 50 years ago during a storm in waters shallow enough that the vessel now serves as an attraction for sport divers and fishermen. Pursuant to the State's law, the State claims title or the right to regulate to the vessel to preserve the area for the sport divers and

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[16]/ As just argued above, the very terms of the ASA in 43 U.S.C. § 2101 and 43 U.S.C. § 2105 would place this example shipwreck in the ownership of the State irrespective of the date of sinking or its purely historical value - it is abandoned and embedded. This, thus, permits non-historic shipwrecks in which States wish to use for other public purposes to be owned by the States.

fishermen. The State preserves and manages the site for this recreational use. Conflict with general maritime law? **No!**

Under the common law, the owner of land is the rightful owner to all lost and abandoned property found embedded in the landowner's soil or to which he has constructive possession. R. Brown, *The Law of Personal Property*, Sec. 12 at 26-27 (1955); *Favorite v. Miller*, 176 Conn. 310, 407 A.2d 974 (1978); *Ferguson v. Ray*, 44 Ore. 577, 77 P. 600 (1904). This theory applies even in abandoned shipwreck cases. *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987); *Klein v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985) [affirming the same conclusion in *Klein v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 568 F. Supp 1562, 1565 (S.D. Fla. 1983)]; *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel* 569 F.2d 330, 337 (5th Cir. 1978); *Lathrop v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 817 F. Supp 953, 964-65 (M.D. Fla. 1993); *Jupiter Wreck, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 691 F. Supp. 1377, 1385-86 (S.D. Fla. 1988).; *Indian River Recovery Co. v. The China*, 645 F. Supp. 141, 144 (D. Del. 1986); *MDM Salvage v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F. Supp. 308, 311 (S.D. Fla. 1986).

Thus, under the common law of finds, the State would be the owner of the vessel. The State statutory claim reflects the desire of the State legislature to claim such vessels when they become abandoned and embedded in the State's lands. The State statute is but a restatement of the common law of

finds. Futher, the statute creates that "colorable" claim to the abandoned vessel where one might wonder if the State ever had any interest in the wreck.

CONCLUSION

For the reasons stated herein, the *Amici* States respectfully request the Court to reverse the lower court decision.

Respectfully submitted,

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August 15, 1997

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